No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., AND
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

PETTTIONERS' REPLY BRIEF

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ARGUMENT

Petitioners showed in their petition that the validity of flow control laws, which have now been authorized in over half the states, is arising with increasing frequency in the lower courts. The issue has already been addressed by four federal courts of appeals, as well as several state appellate courts, with divergent results. Those lower courts are divided on such fundamental issues as the appropriate criteria for judging the constitutionality of restrictions on the export of waste—issues that only this Court can ultimately resolve.

The Opposition does not diminish the problem or offer any principled basis for reconciling the differing views of

the lower courts. Instead, Respondent primarily seeks to avoid these issues by mischaracterizing the decision of the court below and by raising factual issues that are wholly irrelevant to the question presented.

1. Respondent initially contends (Opp. at 10) that the Court lacks jurisdiction because the "state court judgment rests on an independent state ground." The short answer is that this doctrine applies only where the alleged state ground was in fact adopted by the court below as an adequate and independent basis for its decision. *See Michigan v. Long*, 463 U.S. 1032 (1983). Here, Respondent does not even cite to any passage in the opinion below as support for its "state ground" contention—and indeed that opinion is devoted almost entirely to federal constitutional issues.

Respondent's contention, rather, is that there were possible arguments based on state law that the court below *could* have relied upon (but did not). The existence of such arguments, however, plainly cannot deprive this Court of jurisdiction over the federal constitutional issues on which the opinion below was actually based.[1]

Moreover, the asserted state law grounds could not in any event have justified a decision upholding the validity of Local Law 9, the flow control ordinance at issue here. Respondent's position appears to be that Petitioners could not challenge Local Law 9 without also challenging the constitutionality of the Holland-Gromack Law (the state enabling statute) and a Town zoning ordinance applicable to transfer stations. But the Holland-Gromack Law was not even enacted by the state legislature until *after* this litigation was underway, and after the Town's adoption of Local Law 9—as Respondent points out. *See*

[1] Indeed, this Court has noted that it may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied. *Michigan v. Long*, 463 U.S. at 1038 n.4.

Opp. at 3.[2] And in any event, it was not the enabling statute that resulted in injury to Petitioners.

As to the local zoning ordinance (Clarkstown Code Ch. 106), Respondent is merely repeating an argument never adopted by the courts below, *i.e.*, that Petitioners' operations violate the ordinance. *See* Pet. at 5 n.3. The courts below made no such finding. Thus, the decision below does not rest on the zoning ordinance as an adequate and independent state ground for the decision.[3]

2. Respondents next contend that the factual record in this case is insufficient to support Petitioners' challenge to the validity of Clarkstown's flow control law. But the facts relevant to the issue before this Court are essentially undisputed, and the alleged "insufficiencies" do not relate to matters that this Court would have any occasion to address.

[2] Indeed, the state legislature's enactment of Holland-Gromack, retroactively authorizing the Town's adoption of Local Law 9, actually *eliminated* a potential state law issue—*i.e.*, whether the Town had authority under state law to adopt the ordinance at issue.

[3] Moreover, Respondent's contention that Petitioners are in violation of Clarkstown Code ch. 106 is not only irrelevant, but plainly without merit. Ch. 106 merely prohibits the operation of any "transfer station" within the Town other than the designated facility. Respondent's claim that Petitioners are in fact operating a transfer station, rather than a recycling facility, appears to be based solely on the fact that Petitioners' license was originally issued in 1987, at a time when all types of solid waste facilities, including recycling facilites, were denominated as "transfer stations" by the state licensing regulations. *See* 6 N.Y.C.R.R. pt. 360 (1987). The state subsequently adopted separate regulations for recycling facilities, *see* 6 N.Y.C.R.R. pt. 360-12, and Petitioners' application for renewal of its license was filed under the newly-adopted regulations.

Under state law, once a timely renewal application has been filed, the license remains in effect until the application has been acted upon. *See* N.Y. Admin. Proc. Act § 401.2. Thus, Respondent's reference (Opp. at 8) to the "expiration" of Petitioners' permit is not correct.

As explained in the Petition, the key issue—which has divided the lower courts—is whether a law restricting the export of trash out of a state is a protectionist restriction on commerce itself, which can be justified only if it advances legitimate local purposes that cannot be met by nondiscriminatory means, or is instead a law having only an incidental effect on interstate commerce and thus subject to a balancing test. *See* Pet. at 20-22. The facts relevant to this determination, which go simply to the provisions of the ordinance and its implementation by the town, are undisputed.[4] Indeed, there is not even a dispute as to the purpose of Local Law 9, since Respondent has never alleged a non-protectionist purpose, even in its Brief in Opposition.

Respondent's claims of "factual insufficiency" could become relevant, if at all, only *after* the appropriate criteria for the constitutional evaluation of flow control laws have been enunciated by this Court, and only if this Court were to conclude (contrary to Petitioners' contention) that such laws are subject to a balancing test. In that event, the case could of course be remanded for any further factual development that might be needed for final resolution of the case under the appropriate legal standard. And if this Court agrees with Petitioners that flow control laws are a direct restriction on interstate commerce, the facts relevant to a balancing test will be wholly irrelevant.

3. Respondent seeks to distinguish this case (and the federal appellate decisions upholding flow control laws[5])

[4] There is no dispute that Local Law 9, by its terms, prohibits the export of trash by anyone other than the designated facility, and that that facility charges $11 per ton more than Petitioners' facility for its services. Pet. App. 12a. It is also undisputed that, prior to the enactment of Local Law 9, Petitioner shipped separated trash to Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Rec. 82.

[5] *J. Filiberto Sanitation, Inc. v. Dept. of Envir. Prot.*, 857 F.2d 913 (3d Cir. 1988); *Hybud Equip. Corp. v. City of Akron, Ohio*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982).

from the contrary decisions in *DeVito v. Rhode Island Solid Waste Management Corp.*, 947 F.2d 1004 (1st Cir. 1991), *aff'g* 770 F. Supp. 775 (D.R.I. 1991), and *Waste Systems Corp. v. Cty. of Martin*, 985 F.2d 1381 (8th Cir. 1993), based on the fact that the local facilities accomplished "the *final* disposal of waste," Opp. at 16 (emphasis in original), while the waste sent to the Town's facility in this case "re-enters the stream of interstate commerce." *Id.* This factual difference is of no constitutional relevance in evaluating a ban on the export of trash, however, and offers no principled distinction between the two sets of cases.

Whether the Town's facility serves as a final resting point for trash or sends the trash along to other facilities, the Town's flow control law has the purpose and effect of protecting local interests—the Town and its designated contractor—at the expense of Petitioners' out-of-town customers. In either instance, Petitioners are required to pay an additional $11 per ton that they would not have to pay if they could export the trash to more efficient out-of-state facilities. The nature of the protectionism is the same no matter how the Town's facility disposes of the trash.

As a result of the proliferation of flow control laws, and of decisions addressing the validity of flow control laws, the lower courts need guidance on this issue. "Flow control may become one of the most significant waste management issues of the mid-1990s." *Low-Level Radioactive Waste Disposal, Flow Control Are Shaping Up As Major Waste Disposal Industry Issues of 1993*, Solid Waste Digest, Feb. 1993, at 12. Nothing in the Opposition contradicts the necessity for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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